IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.1540 OF 2003

Union bank of India .. Plaintiffs

Versus

Perin Eruch Dastur & Anr. .. Defendants

Mr.B.J. Shah i/b Mahimtura & Co. for the Plaintiffs.

None for the defendants.

CORAM : S.K. SHAH, J.

DATED : 25.2.2005.

P.C.-

1. Learned Counsel for the Plaintiff submits that the parties have settled the matter out of the Court and he be granted permission to withdraw the suit.

2. Plaintiff is allowed to withdraw the suit.

3. Suit stands dismissed as withdrawn.

4. No orders as to the costs.

5. Court fees be refunded as per rules.

[S.K.SHAH, J.]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 2201 OF 1982

Ramshanker Sahab Dayal Mishra & Anr. .. Plaintiffs

Versus

Bernard Peter Pareira & Ors. .. Defendants

None for the Plaintiffs.

Ms. Usha Narsimhan i/b R.C. Dalla for the defendants.

CORAM : S.K. SHAH, J.

DATED : 25.2.2005.

P.C.-

1. No one was appearing on behalf of the plaintiff on the last occasion. Therefore, the matter was kept for dismissal and was shown under the caption 'for dismissal'. Today also nobody is appearing for the plaintiff and the plaintiffs are also not present.

2. Suit, therefore, stands dismissed for default.

3. No order as to costs.

4. Learned Counsel for the defendants submits that the defendant No.8 has deposited amount of Rs.40000/- in this court.

5. Said amount of Rs.40000/- shall be refunded to the defendant No.8.

6. Certified copy expedited.

[S.K.SHAH, J.]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 3633 OF 1989

Murlidhar Gopichand Sachdev & Anr. .. Plaintiffs

Versus

Lalchand Gopichand Sachdev .. Defendants

None for the Plaintiffs.

Defendant- in person present.

CORAM : S.K. SHAH, J.

DATED : 25.2.2005.

P.C.-

1. Defendant- in person present. No one was appearing on behalf of the plaintiffs on the last occasion. Therefore, the matter w as kept for dismissal and was shown under the caption 'for dismissal'. Today also no one is appearing on behalf of the plaintiffs.

2. Since no one is appearing for the plaintiffs, suit is dismissed for default.

3. No order as to costs.

[S.K.SHAH, J.]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 1304 OF 2004

IN

SUIT NO.532 OF 1999

Roda Homi Mistry .. Plaintiff

Versus

1. Minoo Bharucha & Ors. .. Defendants

AND

Tahmina Mistry Alphonse & Anr. .. Applicants

Mr. Pheroj Colabawala i/b Mulla & Mulla for the original Plaintiff - defendant No. 5 and 7.

Ms. F. Sethana i/b Dunmorr Sett for the Defendant 1 to 4.

CORAM : S.K. SHAH, J.

DATED : 28.1.2005.

P.C.-

1. This chamber summons is taken out by the original defendants Nos. 5 and 7 for transposing them as the plaintiffs in place of original plaintiff who has expired.

2. The suit is an administration suit in respect of the Will of the deceased Roda Homi Mistry.

3. The Testamentary Petition No. 105 of 1999 is filed for getting probate of the subsequent Will of the deceased.

4. Learned Counsel for the defendants Nos. 5 and 7 submits that under the Will dated 29.1.1991, which is earlier Will, the defendant No.5 is the executor and legatee and defendant No. 7 is also one of the legatees. In clause -1 of the Will, it has been so mentioned that if Roda Homi Mistry -the deceased - plaintiff, who was appointed as an Executor, fails then her niece Tahmina Mistry Alphonse - defendant No.5 will be the sole executor and trustee of the Will. In para-5 of the Will defendant No.5 and in para-6 of the Will, defendant No.7 are shown to be legatees. It is under these circumstances, learned Counsel appearing for defendant Nos. 5 and 7 submits that they be transposed as plaintiffs in place of the deceased - plaintiff and

be allowed to pursue the administration suit.

5. Learned Counsel representing defendants Nos. 1 to 4 pointed out the provisions of section 213 and 222 of the Indian Succession Act, 1925 for submitting that the probate can be granted only to the Executors appointed under the Will. She has tried to interpret clause-[1] of the Will to say that defendant No.5 could come in place of the original executor Roda Homi Mistry only if the said Roda would have predeceased the deceased. However, that interpretation has been contradicted by the learned Counsel for the Plaintiff. That aspect is not necessary to be considered at this stage as from the reading of clause -1 of the Will, the defendant No.5 is named as one of the Executors and it is clear that the first executor Roda Homi Mistry is not alive. That point could be agitated afterwards but to my mind there is no difficulty in allowing the defendant No.5, who is one of the executors named and defendant No.7 who is one of the legatees to pursue this administration suit. Learned Counsel for the defendants Nos. 1 to 4 also brought to my notice the Judgment of the Madhya Pradesh High Court in the case of *ABDULSATTAR VS. ISMAIL* reported in *AIR 1958 M.P 373*, for submitting that under the provisions of section 222 of the Indian Succession Act, only an Executor can seek probate and not the heir

of the Executor. There should be no dispute with regard to this proposition. But as I already pointed out, the Will mentions the name of the defendant No.5 as the executor in absence of the first executor- Roda Homi Mistry. However, this point also could be open for the arguments later on.

6. As regards the contention that this suit abates, it is difficult to accept the contention. In the Apex Court decision rendered in the case of *SMT.GIRIJANANDINI DEVI VS. BIJENDRA NARAIN CHOUDHARY* reported in *AIR 1967 S.C. 1124*, it is held that

> *"... The maxim 'actio personalis moritur cum persona' a personal action dies with the person, has a limited application. ..."*

In the present case, the deceased was an executor and her personal action for administration of the property of the deceased under the Will died with her. However, the action of appointing executorship survives and that could be allowed to be continued by the defendant No.5, who is one of the named executor under the Will.

7. Under these circumstances, I do not find any merit

in the contention raised on behalf of the defendants Nos. 1 to 4. The Chamber Summons needs to be allowed hence order :

ORDER

1. Chamber Summons is allowed and made absolute in terms of prayer clauses [a], [b] and [c] of the Chamber Summons.

2. No order as to the costs.

3. It is clarified that all the contentions raised kept open.

4. Amendment shall be carried out within eight weeks from today.

[S.K.SHAH, J.]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1500 OF 1982

Isaac Abraham Talegawkar & Ors .. Plaintiffs

Versus

Alitalia .. Defendants

None present for the Plaintiffs.

Mr.Sameer Sawant i/b Mulla & Mulla for the Defendants

CORAM : S.K. SHAH, J.

DATED : 28.1.2005.

P.C.-

1. None for the Plaintiffs.

2. Suit be kept for dismissal on 4th March, 2005.

3. Matter be shown under the caption ’for dismissal’

[S.K.SHAH, J.]